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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1950

No. 942

[illegible] WITT,

Petitioner,

vs.

[illegible] STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Judgment Sought to Be Review.

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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

RUTH ETTA WITT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Review.

Petitioner, Ruth Etta Witt, respectfully petitions for a Writ of Certiorari to review the judgment against her in the United States District Court in and for the Southern District of California, Central Division, and the judgment of affirmation in the United States Court of Appeals for the Ninth Circuit. The United States District Court reindered no opinion. The trial was by jury and judgment was pronounced subsequent to the conviction by said jury. The opinion of the Ninth Circuit Court of Appeals is as yet unreported, but a copy is attached hereto in the appendix and is hereby referred to. A copy of the opinion also appears in the record on appeal.

The defendant, your petitioner, was charged with a violation of U. S. C. A., Title 21, Section 174, (illegal importation of narcotics), in that she did knowingly import and bring into the United States of America from a foreign country, namely, Mexico, a certain narcotic drug, namely, heroin [Clk. Tr. p. 2]. After trial by jury, the defendant-petitioner was found guilty as charged in the Indictment [Clk. Tr. p. 28]. The defendant was sentenced to imprisonment for a period of five (5) years. [See Judgment, Clk. Tr. pp. 29, 40.]

Petitioner filed her Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, briefs were filed, the matter argued, and on February 16, 1961 the Court rendered its opinion affirming the judgment and order appealed from.

Petitioner filed a Petition for Rehearing before the United States Court of Appeals, Ninth Circuit, and Rehearing was denied on April 3, 1961 (See record on appeal).

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U. S. C., Section 1254(1).

Opinion Below.

The District Court rendered no opinion; trial was by jury.

The United States Court of Appeals rendered its opinion and a copy of the same is attached hereto in the appendix and is hereby respectfully referred to. A copy also appears in the record of the Court of Appeals transferred to this Court by the Clerk of said Court.

Questions Presented.

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

II.

THE EVIDENCE WAS NOT SUFFICIENT.

Statutes Involved.

21 U. S. C., Section 174.

The text of this statute is set forth in Appendix "B" to this Petition.

Statement of the Case.

By an Indictment returned by the Grand Jury in the United States District Court, in and for the Southern District of California, Southern Division, the defendant and appellant was charged with having violated U. S. C. Title 21, Section 174 (illegal importation of narcotics), in that she did knowingly import and bring into the United States of America, from a foreign country, namely, Mexico, a certain narcotic drug, namely, heroin [Tr. of Rec. p. 2].

A notice of motion for the suppression of evidence was duly served and filed [Tr. of Rec. pp. 4, 5, 6], including the motion itself and points and authorities. To the indictment the defendant-appellant entered a plea of not guilty [Tr. of Rec. p. 8].

The motion to suppress was heard on two separate occasions. After the motion was heard, the same was

by the Court denied, and the cause was transferred to Judge Lindberg for jury trial [Tr. of Rec. p. 16].

In connection with the motion to suppress certain evidence, Findings of Fact and Conclusions of Law were made and filed by the Court [Tr. of Rec. pp. 34-40].

After trial by a jury, the defendant-appellant was found guilty as charged in the Indictment [Tr. of Rec. p. 28].

At the conclusion of the defense case, a motion for judgment of acquittal was made by the defendant, and by the Court denied [Tr. of Rec. p. 26].

After the verdict of guilty was filed and entered, the motion for new trial and judgment of acquittal was made by the defendant and the matter continued for hearing [Tr. of Rec. p. 27].

Thereafter: a motion for new trial was duly made and denied; a motion for judgment of acquittal was made and denied; and the defendant-appellant sentenced to imprisonment for a period of 5 years [Tr. of Rec. p. 29].

Judgment rendered by the Court is found at page 30 of the Transcript of Record.

Motion for new trial is found at page 32 of the Transcript of Record

Thereafter, a notice of appeal was duly served and filed [Tr. of Rec. p. 43].

Thereafter, a Request for Designation of Record was served and filed [Tr. of Rec. pp. 44-46], which said Request for Designation of Record included a statement of points upon which the appellant intended to rely upon appeal.

The jury found the petitioner guilty. The Court sentenced the petitioner for a period of five (5) years. The Court of Appeals affirmed the judgment, denying the Petition for Rehearing, and issued an order staying the issuance of the mandate conditioned on the filing of this Petition in the Office of the Clerk of the Supreme Court of the United States on or before May 4, 1961.

SPECIFICATIONS OF ERROR.

I.

The Evidence, Namely, the Narcotics, Was Obtained as a Result of an Unlawful Search and Seizure. The Court Erred in Denying the Defendant-Appellant's Motion to Suppress.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence [Tr. of Rec. pp. 4-8]. Evidence was offered to the effect that there was no search warrant, no warrant of arrest, and after the defendant-appellant crossed the border from a visit to Mexico, after perfunctory questions as to where she was born (the United States) the Customs Agent ordered her and her companion to move over, and the car was driven by the Agent to the side of the Customs Office. The defendant-appellant was there thoroughly searched by a matron, and in her brassiere the matron claimed she found a package. It was claimed the package was given to her in Mexico by a friend and that it was in her coat pocket. The only reason for stopping the car in which appellant was riding was a directive to the Customs Agent by a superior to be on the lookout for a car answering the description of the car occupied by appellant containing two colored women. The car contained the appellant and a colored man. The Court erred in denying the motion to suppress. The Court made Findings of Fact and Conclusions of Law [Tr. of Rec. pp. 34-40]. The Court erred in denying the motion to suppress—the search was invalid.

II.

The Evidence Was Not Sufficient.

If the Court had granted the motion to suppress the use of the contraband obtained as a result of an unlawful search, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

The Court instructed the jury to the effect that there was possession in the appellant and such possession created a permissible inference of guilt.

Without the evidence of the contraband, and without such instruction, the evidence was not sufficient. The Court erred in denying our motion for judgment of acquittal [Tr. of Rec. p. 26]. The motion was renewed and denied at the time of making the motion for new trial, and the Court denied the same [Tr. of Rec. p. 29].

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Evidence, Namely, the Narcotics, Was Obtained as a Result of an Unlawful Search and Seizure at the Border. The Court Erred in Denying Defendant-Appellant's Motion to Suppress.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence [Clk. Tr. pp. 4-8]. Evidence was offered to the effect that there was no search warrant or warrant of arrest and, as the defendant-appellant crossed the border from a visit to Mexico, after perfunctory questions as to where she was born (United States) and similar questions put to a male companion, the Customs Agent ordered her and her companion to move over. The car was driven by the Agent to the side of the Customs Office; the defendant-appellant was taken into a room while the male attendants remained outside; she was thoroughly searched by a matron, and in her brassiere the matron claimed she found a package which it later developed contained narcotics. It was claimed the package was given to her in Mexico by a friend and that it was in her coat pocket. The only reason for stopping the car in which appellant was riding was a directive to the Customs Agent by a superior to be on the lookout for a car answering the description of the car occupied by appellant, containing two colored women. The car actually contained the appellant and a colored man. The petitioner was thoroughly searched, was told to take her clothing off and, when she remonstrated, she was told her clothing would have to be taken off by her.

or they would be taken off of her. This statement was made by Mrs. Lohman, the matron [R. T. pp. 120-122]. She did not actually see from where the matron took the package which she had been given by a Mr. Macias in Mexico [R. T. pp. 122, 123]. The matron examined her whole body, her mouth, her ears, her arms, between her legs, her toes, and the bottom of her feet. The Government Matron admitted that she told Mrs. Witt, "If she didn't take off her clothing, her clothing would be taken off of her." The petitioner then removed her clothes; she was examined thoroughly, including her rectum and her private parts, in fact, every bit of her [R. T. pp. 74-76]. There was no reasonable cause for the search. The Court erred in denying the motion to suppress. The search was invalid [R. T. pp. 34-40].

II.

The Evidence Was Not Sufficient.

If the Court had granted the motion to suppress the use of the contraband obtained as a result of an unlawful search, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

The Court instructed the jury to the effect that there was possession in the appellant and such possession created a permissible inference of guilt.

Without the evidence of the contraband, and without such instruction, the evidence was not sufficient. The Court erred in denying our motion for judgment of acquittal [Tr. of Rec. p. 26]. The motion was renewed and denied at the time of making the motion for new trial, and the Court denied the same [Tr. of Rec. p. 29].

Summary of the Argument.

1. It is our contention that the evidence was insufficient. The search was made in the absence of a warrant of arrest, in the absence of a search warrant, and there was no reasonable cause for the search. The appellant had been to Mexico, had been given a package, the contents of which she denied, she had knowledge of, and after crossing the border the Customs Agent, because he had been alerted to be on the lookout for a certain car, containing two colored women, forced the appellant against her will to submit to a most thorough search covering every portion of her anatomy.

2. The Court erred in denying the motion for judgment of acquittal. The evidence was not sufficient in the absence of a contraband unlawfully seized and in the absence of the instruction to the effect that the appellant would be required to satisfactorily explain possession of the contraband. There was not sufficient evidence.

ARGUMENT.

I.

The Evidence, Namely, the Narcotics, Was Obtained as a Result of an Unlawful Search and Seizure. The Court Erred in Denying the Defendant-Appellant's Motion to Suppress.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence [Tr. of Rec. pp. 4-8]. Said motion was supported by points and authorities. The hearing was held before the Court, at which time evidence was offered in support of the motion. The hearing was continued for the taking of further evidence. The motion to suppress was denied [Tr. of Rec. p. 16]. The Court made findings of fact and conclusions of law [Tr. of Rec. pp. 34-40].

We have carefully reviewed the evidence in the statement of facts pertinent to the appeal, and will not here repeat it, in the interest of brevity.

Summarized, the evidence shows that Mrs. Witt, a widow, of Los Angeles, employed by the County of Los Angeles, at the General Hospital for some 8 years, had known her friend, Mr. Anderson, a Los Angeles Fireman, for some 10 or 12 years; they had gone to Tijuana, to the race track, the Jai Alai games; Mrs. Witt had gone downtown in Tijuana looking at the stores and she met a man by the name of Cruz Macias whom she had known before and whom she had agreed to meet. Upon meeting Mr. Macias, he took her to another house where she met a man by the name of Hill. Macias

asked Mrs. Witt to take a package for him and deliver it to a friend of his; she asked if that was all right and he replied it was; she says she put the package in her coat pocket; that she later met Mr. Anderson, they stopped for gasoline at a service station and then Mr. Anderson drove the car to the border and crossed the border. At the border the inspector asked them where they were born; Mr. Anderson answered in Los Angeles, Mrs. Witt in Mississippi; they were asked if they had brought any liquor or merchandise across the border, and they replied no; at this time the inspector at the Customs Office on the United States side of the border told Mrs. Witt and Mr. Anderson to put their hands on the dashboard of the car; he then told them to move over and he climbed in the car, drove it over to the side of the Customs House, and they were then taken into the Customs Office. Anderson was thoroughly searched after having been stripped; he was asked if he would submit to a lie detector test, and he said he would. He denied any knowledge of any narcotics; none were found on him or in the car. A matron was sent for, a Mrs. Lohman, who was a Customs Office Inspectress, and she took Mrs. Witt into a room and told Mrs. Witt to take off her clothes. Mrs. Witt stated she wanted to know why and she was told, in effect, that she had to take her clothes off or they would be taken off for her. After this statement by her by the Customs matron, Mrs. Witt took her clothes off. The clothing was searched; Mrs. Witt's body was minutely examined, her mouth, her ears, her hair, her feet, her private parts; the matron looked in her rectum; felt her skin; examined her vagina; and after such examination stated to Mrs. Witt she had found a pack-

age in Mrs. Witt's brassiere. Mrs. Witt denied ever having the package in her brassiere, and said she had received it from Mr. Cruz and put it in her coat pocket, and that it had been there at all times. She did not see the matron take the package from her coat or elsewhere, but the matron testified that she had found it in the brassiere. Mrs. Witt denied it was ever there.

The only information the officers had concerning Mrs. Witt or this automobile was they had received information from a superior to stop and examine a car answering the description of the car in which Mrs. Witt was riding, and this information was to the effect there would be two colored women in the car. There were not two colored women in the car; it was occupied only by Mr. Anderson, the Los Angeles Fireman, and Mrs. Witt.

It is our contention that in the absence of a warrant of arrest, the absence of a search warrant, or in the absence of a search incident to a lawful arrest, the Court erred in denying the motion to suppress. There was no reasonable or lawful reason for this search. The inspector did not have before him anything which justifies this search.

A person aggrieved by an unlawful search and seizure may move the Court for the return of the property and to suppress for use anything so obtained on the grounds that the property was illegally seized without a warrant. (Rule 41(e), Federal Rules of Criminal Procedure).

No search warrant having been obtained or having been used in this case, no warrant of arrest having been obtained or secured, and the search not being incident to a lawful arrest, it is our contention that the Court

certainly erred in denying the motion to suppress. There was no lawful reason for this search. The officers did not have before them any information, any reasonable or probable cause for making the search; they had the bare statement of a superior to stop a car answering this description, it contained two colored women, and to make a search.

Mrs. Witt was never told she was under arrest until after the search had been made, and the record is barren of any information which justified the search.

As was said in *Johnson v. United States*, 68 S. Ct. 367, 333 U. S. 10, pages 13 and 14:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

It is our contention that the case of *Blackford v. United States*, 247 F. 2d 745, decided in July, 1957, based upon the question of the legality of search and seizure by Government Agents at the border without warrant is in point while from the facts of that case, it was held the search and seizure was legal and with reasonable and with probable cause, the law with reference thereto is clearly stated in *Blackford v. United States, supra*, 247 F. 2d 745, 750:

> "The Fourth Amendment provides that, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

* * *. It makes no difference between persons and property. It does not value property over human anatomy, nor differentiate between them. The prohibition is broad and unqualified. All unreasonable searches and seizures are forbidden. (cases cited). It is true, as heretofore noted, that historically the Fourth Amendment was designed to curb the nefarious practice of arbitrary government invasion of private homes. But the Framers of our Constitution in their infinite wisdom did not produce so narrow a safeguard. The Amendment they enacted did more than simply provide protection against immediate threat. It provided a bulwark against unreasonable governmental searches and seizures conducted on persons as well as places."

It should be borne in mind that this search was made without any warrant, without any reasonable or probable cause, and the case of *Miller v. United States*, 2 L. Ed. 1332, 1337, reviews the history of unlawful searches, particularly where no notice or sufficient warning of the intentions of the officer is given to the occupant of his home before the entered it. No notice of this search was given nor the reason therefor. Mrs. Witt was taken out of the car, taken into a room, and even the officer admits that Mrs. Witt did not consent to the search. Mrs. Witt was told in substance to "either take off her clothes or they would be taken off of her." Every inch of her anatomy was then thoroughly searched.

Throughout the United States the courts have become alerted to the failure of officers to obtain search warrants and the continuous unlawful arrest of people

and search of their persons, cars and premises has been condemned. Only recently, in the case of *People v. Cahan*, 44 Cal. 2d 434, the Supreme Court of California, reviewing the history of searches, and particularly in this State and throughout the country, reversed the rule concerning the admission of evidence obtained by search and seizure as a wrong which had been in force in California for almost half a century. As was said in *People v. Cahan, supra*, 44 Cal. 2d 434, 446, 282 P. 2d 905:

> "It is morally incongruous for the state to flaunt constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, *The Wolf Case*, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.' If the Government becomes a law-breaker,

it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 485 (48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376); see also *State v. Owens*, 302 Mo. 348, 377 (259 S. W. 100, 32 A. L. R. 383); *Atz v. Andrews*, 84 Fla. 43 (94 So. 329, 332); *Youman v. Commonwealth*, 189 Ky. 152 (224 S. W. 860, 866, 13 A. L. R. 1303); *State v. Arregui*, 44 Idaho 43 (254 P. 788, 792); *State v. Gooder*, 57 S. D. 619 (234 N. W. 610, 613).)"

The search of Mrs. Witt could only be justified if the searcher, the officer, had probable cause to believe that Mrs. Witt was carrying contraband or committing a crime. This means not only that the officers must have actually believed that Mrs. Witt was carrying contraband or committing a crime, but that there was a reasonable basis for the conclusion (*Clay v. United States*, 5th Cir. 1956, 239 F. 2d 196, 202).

The only basis for this search, as we have said before was some information given by a superior to the officers in charge of the search to stop this car containing two colored women and search it. Where did the superior get the information? What was the source of it? There is nothing upon which to determine that there was any reasonable cause for this search.

The burden of showing probable cause is upon the Government.

Wrightson v. United States (D. C. Cir. 1955), 222 F. 2d 556.

It has been said that when the only basis for the arrest is an informer's tip, this burden requires an affirmative showing of reasonable grounds for reliance.

United States v. Walker (7th Cir. 1957), 246 F. 2d 519;

Contee v. United States (D. C. Cir. 1954), 215 F. 2d 324;

Draper v. United States (10th Cir. 1957), 248 F. 2d 295, affirming (D. Colo. 1956), 140 Fed. Supp. 689.

In the instant case we had no information as to why a superior said to stop and search the car. Surely that is not enough.

Evidence acquired in violation of the Fourth Amendment prohibition against unreasonable searches and seizures is not admissible in Federal prosecutions. Concerning this there can be no question.

Weeks v. United States, 232 U. S. 383.

The Fourth Amendment contemplates judicial supervision of searches and seizures.

Henry v. United States, 4 L. Ed. 2d 134, (U. S. S. Ct. Nov. 23, 1959).

In *Henry v. United States, supra*, the Supreme Court stated:

"The fact that the suspects were in an automobile is not enough."

Carroll v. United States, 267 U. S. 132, liberalized the rule governing searches when a moving vehicle is involved, but that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.

All the fruits of an illegal search are inadmissible.

Silverthorne Lbr. Co. v. United States, 251 U. S. 385.

The Opinion of the Circuit Court.

The Circuit Court Opinion says:

> "No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone." (Opinion, Circuit Court, p. 3).

Thus, the Court flatly holds that the mere crossing of the border is sufficient cause for the search, and because such searches has been conducted for 100 years, the Circuit Court seems to feel that is sufficient. We contend there is no restriction or exemption contained in the Fourth or Fifth Amendment to the Constitution of the United States. Had Congress intended to permit such searches, they would have so said.

While it is true different rules may have been evolved, we still contend that the same basic rules relative to search and seizure apply when an American citizen crosses the border that apply if the officers enter his home. The Constitution makes no distinction. There is nothing in the Constitution, or its Amendments,

which exempts the officers from complying with the laws relative to search and seizure. A search at the border is no different than any other search. While we understand the reason they are advocated by law enforcement officers, prosecutors and courts with reference to such searches, our founding fathers upon whom the imprint of the heel of tyranny was fresh caused the Amendments to the Constitution to be submitted to the people and they were duly ratified.*

These Amendments are plain and, if Congress or the people in ratifying the same through their various legislative bodies had felt that an exception should be made as to border searches, they would have said so, we respectfully suggest.

In this case, it is our contention that the same rule of law applies to a border search of a citizen as applies

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*"AMENDMENT IV

"SEIZURES, SEARCHES AND WARRANTS

"(Section 1). The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Proposed September 25, 1789; ratified December 15, 1791.

"AMENDMENT V

"CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY.

"(Section 1). No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Proposed September 25, 1789; ratified December 15, 1791.

to him at his home, regardless of the fact that various rules have been adopted and these searches have been carried out. That does not mean that such searches have been lawful or that the Amendments permitted these searches without reasonable cause. That is the question here. Can such a search be made without reasonable cause? We have contended, and do now contend, that such searches are not permitted by the Fourth and Fifth Amendments*

II.

The Evidence Was Not Sufficient.

We have fully stated the evidence and, if this Court should order that the narcotics or contraband was obtained as a result of an unlawful search and seizure, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

We are not unmindful of the problems of the trier of fact and that of the Appellate Court, but in this case there was no substantial evidence that the defendant had guilty knowledge of the nature of the contraband. Her answers throughout were those of an innocent person and, with the exception of a statement given to the officer in the second conversation which was not recorded wherein it is alleged she made some admission of a damaging character, her entire conduct was that of an innocent person. It should be borne in

*The Fifth Amendment comes into play because the evidence obtained as a result of the unlawful search is used against the accused in violation of the particular provision of the Fifth Amendment, which provides: ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

mind that the presumption of innocence prevails and her guilt was not established beyond a reasonable doubt.

To sustain a conviction in a case such as this the Government offered, and the Court gave, the following instruction:

> "Another statute has application to the offense charged here, and that is Section 174 of Title 21 of the United States Code, which provides as follows:
>
> "'Whenever on trial for violation of this' . . . statute 'the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'
>
> "The statute I have just read does not change the fundamental rule that a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Nor does it impose upon the defendant the burden of producing proof that the heroin was lawfully imported or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt by the evidence beyond a reasonable doubt. What the statute I referred to and just read a moment ago does do, however, is to create an inference in favor of the United States. Thus, if you should find from the evidence, beyond a reasonable doubt, that there was possession, as that term will be defined to you, on the part of the defendant of any of the heroin referred to in the indictment, such possession creates a permissible inference of guilt as charged in the indictment.

"As against that inference there is the possible contrary inference that the heroin was not imported contrary to law, or that the possession thereof was innocent."

It is our contention that such an instruction places upon the defendant a burden which he should not be subjected to. For instance, the instruction said: "Such possession creates a permissible inference of guilt as charged in the indictment." [The instruction just hereinabove referred to is found at pages 165 and 166 of the Reporter's Transcript.]

Title 21, Section 174, does not mean that an accused must take the witness stand and explain his possession of narcotics, and a trial court has a duty to make this clear. We raise this point in connection with the sufficiency of the evidence because we think it has a direct bearing here, for a defendant is placed in a position by reason of this instruction and rule that he must of necessity take the stand and explain possession, which places him on either horn of a dilemma; if he fails to take the stand and explain, then an inference of guilt is permissible, according to the instruction; if he takes the stand and explains, if it is not satisfactory to the jury, then he is in no better position than he was before, for the jury under this instruction may draw "a permissible inference of guilt."

The Fifth Amendment to the United States Constitution provides that no person . . . shall be compelled in any criminal case to be a witness against himself, and Congress has provided that a failure to testify cannot be used even as a presumption against a defendant (Title 18, U. S. C., Sec. 3481; *Bruno v. United States* (1939), 308 U. S. 287). For these reasons

Title 21, Section 174, can not be and has not been, so far as we know, interpreted as requiring the accused to take the stand on his own behalf.

The instructions of the District Court in this case suggest not that the jury may reasonably infer the additional necessary elements of the crime charged if an accused does not show their absence, but that the accused himself must explain to the jury his possession of contraband.

Moreover, a statutory presumption such as Title 21, Section 174, must be reasonable even though it is nothing more than a "rule of evidence." *Tot v. United States* (1943), 319 U. S. 463.

It is our contention that Title 21, Section 174, as applied in this case is unconstitutional for it would, as in this case, violate the rule of presumption of innocence and reasonable doubt.

It will be noted that the concluding sentence of Section 174, Title 21, contains this statement ". . . such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." This, we contend, is contrary and in violation of the Fifth Amendment to the Constitution of the United States, a violation of due process of law.

The Supreme Court has without exception held the Constitution the "supreme law of the land," and superior to acts of Congress of the United States repugnant to the Constitution, have without hesitation on the part of the United States Supreme Court been voided. As was said in the case of *West Virginia State Board of Education v. Barnette*, 319 U. S. 646, at 671:

"The very purpose of the Bill of Rights is to withdraw certain subjects from the vicissitude of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right of life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election."

In *United States v. Butler*, 297 U. S. 62, the Court held:

"The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down."

But for the evidence obtained as a result of the unlawful search and seizure, as we contend and this instruction hereinabove complained of involving Title 21, U. S. C., Sec. 174, wherein the burden is shifted to the defendant, it is our contention that the evidence is woefully weak and not sufficient to sustain the conviction.

Conclusion.

We respectfully urge that the Petitioner has authority and justice on her side. The mere fact that for 100 years such border searches have been tolerated should not deny to this Petitioner the right to have such a search suppressed. It was against the spirit of both the Fourth and Fifth Amendments to the Constitution of the United States, and if this decision of the United

States Court of Appeals be permitted to stand, it will be authority for unbridled searches at the border.

We respectfully ask that this Court should grant Certiorari to the end that the judgment of the District Court and of the United States Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX "A".

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Ruth Etta Witt, Appellant, vs. United States of America, Appellee. No. 17,051.

Feb. 16, 1961.

Appeal from the United States District Court for the Southern District of California, Southern Division.

Before: Barnes, Hamlin and Merrill, Circuit Judges.

Barnes, Circuit Judge:

Appellant, a first offender, was sentenced to five years imprisonment for importing two and one-quarter ounces of heroin from Mexico, in violation of 21 U. S. C. §174. She asserts (1) that the narcotics were obtained by an unlawful search and seizure; and should have been suppressed on appellant's motion; (2) without the narcotics in evidence, there was insufficient evidence to convict her; (3) 26 U. S. C. A. §7237(d) prohibiting suspension of sentence in order to grant probation in certain narcotics offenses, in its unequal operation (by giving the United States Attorney a choice of the crime for which he asks an indictment), results in lack of due process.

Appellant admittedly had narcotics on her person when she crossed the border from Mexico to the United States. She asserts they were there innocently, that she was asked by a friend in Mexico to deliver a package in Los Angeles to a certain street corner to a per-

son named "Bo." She had asked her "friend" in Mexico if delivering the package "was all right," and had been assured it was. She claimed to have had no knowledge the package contained narcotics. Appellant insisted the narcotics package was in her coat pocket; the witness who searched her (Mrs. Lohman) testified it was concealed in appellant's brassiere. Another witness (Customs Agent Gates) testified appellant had told him, when she was first questioned, she had no knowledge that the package contained a drug, but that later, in the presence of other Customs agents, she stated that:

> "she had been given the money for the narcotics by a man in Los Angeles by the name of Bo; that she had met this Mexican in Tijuana, had given him some money and had taken the narcotics; she was supposed to deliver the narcotics to Bo at the corner of Central and Vermont, in Los Angeles, and receive $100."

In his report, made shortly after the incident of the arrest, Customs Agent Gates had written (Defendant's Ex. A):

> "The only statement of any consequence made by Mrs. Witt during the interview was that she was to receive $100 for making this trip; that she had been given money to pay for the narcotics, which she was then to deliver to a person known to her as 'Bo' at Vernon and Central Streets, in Los Angeles, California. . . ."

Thus there was created a sharp dispute of fact for the determination of trier thereof—did Mrs. Witt lie as to

where and how the package was carried, and whether she knew it contained narcotics; or did Customs Agents Lohman and Gates lie on these subjects?

The jury found for the government on this disputed issue of fact. We are required to view the evidence in a light most favorable to the government. Northcraft v. United States, 1959, 271 F. 2d 184, 187; Humes v. United States, 1898, 170 U. S. 210, 212-3. We cannot disturb that judgment.

Much is said on this appeal about an unlawful search. This was a border search; and while it, as well as any other, must be lawfully conducted, different rules of law are applicable, and for over a hundred years have been applicable with respect to the plenary power to search at the border and the more circumscribed search power existing anywhere else within the country's boundaries. This distinction was recognized by the very Congress which proposed for adoption the admendments to the Constitution, including the Fourth which prohibited unreasonable search and seizures. Plainly, "the members of that body did not regard searches and seizures of this kind as 'unreasonable' and they are not embraced within the prohibition of the Amendment." Boyd v. United States, 1885, 116 U. S. 616, at 623; Carroll v. United States, 1924, 267 U. S. 132, 159-60. No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone. That the customs authorities do *not* search every person crossing the border does not mean

they have waived their right to do so, when they see fit.[1] Here a precise description of the automobile in which appellant rode across the border (though not of its passengers)[2] had been passed to the border guards as one being a possible bearer of heroin. This it was ultimately found to be. Mere suspicion has been held enough cause for a search at the border. Cervantes v. United States, 9 Cir., 1959, 263 F. 2d 800, 803, n. 5.

Appellant likewise urges that she was required to strip herself of all her clothing at the time she was searched. Such a search is frequently necessary.[3] We take it that is the reason Congress, in its wisdom, has seen fit to authorize the employment of female customs inspectors who have the specialized duty of searching females crossing our borders.[4] No force was used against appellant, and none is charged. No indignities to the appellant are charged against the customs inspectors. The

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[1]19 U.S.C. § 482. 19 U.S.C. § 1581. 19 Code of Fed. Reg., part 23, § 23.1(d), reads:

> "(d) A customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting and searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law. . . ."

[2]The "lookout list" or "Information Bulletin" included a description of an automobile by make, year, color, and California vehicle registration number. The list further indicated that one or two Negro women would be in the vehicle (Gov. Ex. 1).

[3]Murgia v. United States, 9 Cir., 1960, ... F.2d ..... (No. 16811, decided December 9, 1960); King v. United States, 5 Cir., 1958, 258 F.2d 754, note 5; Blackford v. United States, 9 Cir., 1957, 247 F.2d 745. "The court is bound to take notice of public facts." The Apollon, 9 Wheat. 362.

[4]19 U.S.C. § 1582.

search was reasonable and the resulting seizure was lawful.

Having made that determination, we cannot suppress, the evidence uncovered by such lawful search. The appellant having the heroin on her person, it was for the jury to determine how and why it was being so carried. On this determination rested the guiit or innocence of the appellant.

Appellant next objects that she did not receive probation—pointing to her previous good record. Section 7237, Title 26 U. S. C., relates generally to the violation of laws relating to narcotic drugs and to marijuana. As amended, effective July 19, 1956 (70 Stat. 568) it provides, in pertinent part, as follows in subdivision (d):

> "(d) *No suspension of sentence; no probation, etc.*—
>
> "Upon conviction—
>
> "(1) of any offense the penalty for which is provided in . . . subsection (c) . . . of section 2 of the Narcotic Drugs Import and Export Act, as amended . . . the imposition or execution of sentence shall not be suspended, *probation shall not be granted*, section 4202 of Title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply." (Emphasis added.)

21 U. S. C. §174 is based on former subsections (c) and (f) of the Act of February 9, 1909, as amended by the Act of May 26, 1922, known as the Narcotic

Drugs Import and Export Act (*cf.* 21 U. S. C. A. Ch. 6, p. 181, 42 Stat. 596.) That Act provided, before amendment, a penalty of "not more than ten years." In 1951, the minimum penalty was raised to two years for the first offense. By the 1956 amendment, the penalty was changed for first offenders to imprisonment of "not less than five or more than twenty years." 70 Stat. 570. *Cf.* 1956 U. S. Code Cong. & Adm. News, Vol. 2, pp. 3274-3321.

Appellant urges that while Title 26 U. S. C. A. §7237(d), prohibiting suspension of sentence for the granting of probation upon conviction of certain narcotic offenses appears to be fair on its face, "administratively it is applied with an evil eye and an unequal hand in a manner forbidden by the due process clause of the Fifth amendment to the Constitution of the United States." We need not tarry long on this point. As we understand appellant, she urges lack of due process because of the value judgment which must be exercised by the United States Attorney in determining under which of the several existing statutes, which may be applicable to the illegal importation of narcotics, a defendant should be prosecuted. Some discretion has always existed in the hands of prosecuting attorneys, and always will. We have discussed and disposed of this point in Marcella v. United States, 1960, ... F. 2d ..... (No. 16910, decided December 5, 1960.) *Cf.* Lathem v. United States, 5 Cir., 1958, 259 F. 2d 393, and particularly the language of the court at p.

397.[5] The sentence being within the limits allowed by the statute, this court has no authority to lessen or in any way change the sentence. Brown v. United States, 9 Cir., 1955, 222 F. 2d 293; Freeman v. United States, 9 Cir. 1917, 243 F. 2d 353, 357.

The judgment is *affirmed*.

(Endorsed) Opinion Filed Feb. 16, 1961.

Frank H. Schmid. Clerk.

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[5]This reads:

"Appellant seems to think that a first offender is entitled to special consideration. He is right, but it is not the consideration he has in mind. The legislative history of the statute shows that the first offender is given special consideration—when it comes to trafficking in narcotics. He is denied probation and parole and sentenced to a minimum of five years imprisonment. The House and Conference Report on the bill that became the Narcotic Control Bill of 1956, points out that eighty per cent of violators of the narcotic laws are first offenders. 'Therefore it is the view of your committee that the first-offender-peddler problem will become progressively worse and eventually lead to the large scale recruitment of our youth by the upper echelon of traffickers unless immediate action is taken to prohibit parole, probation, or suspension of sentence in case of all persons convicted in narcotic and maribuna drugs.' . . . 2 U.S. Code Congressional and Administrative News, 84th Cong., 2nd Sess., 1956, p. 3274. . . . Congressional intent is clear." 259 F.2d at 397.

APPENDIX "B".

U. S. C., Title 21, Section 174:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of the section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

No. 942

MAY 26 1961

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

RUTH ETTA WITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (III R. 3-7;[1] Pet. App. "A", pp. 1-7) is reported at 287 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961 (III R. 8). A petition for

[1] "R." refers to the three volumes of the transcript of record in the courts below on file in this Court, and will be designated by the appropriate volume number.

rehearing was denied on April 3, 1961 (III R. 91). The petition for a writ of certiorari was filed on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, upon entry into the United States, was lawfully searched by a customs inspectress, and whether narcotics found on her person were lawfully seized.

2. Whether 21 U.S.C. 174 is constitutional in permitting a presumption arising from possession.

STATUTES INVOLVED

19 U.S.C. 482, 14 Stat. 178, provides in pertinent part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law * * *; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, * * * he shall seize and secure the same for trial.

19 U.S.C. 1582, 46 Stat. 748, provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

21 U.S.C. 174, 70 Stat. 570, provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned not less than five or more than twenty years * * *.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * *

STATEMENT

Petitioner was convicted (II R. 178-180) in the District Court for the Southern District of California on one count of an indictment charging willful trans-

portation of narcotics into the United States, in violation of 21 U.S.C. 174 (I R. 2; see II R. 164). She was sentenced to five years' imprisonment (II R. 197; see I R. 27-30). On appeal, the conviction was unanimously affirmed (III R. 7, 8; Pet. App. "A"; p. 7). The principal issue raised is the validity of the search of petitioner's person from which the narcotics were seized.

At a pre-trial motion to suppress, it was shown that, on December 26, 1959, Customs Inspector Rudolph Dale was told to be on the lookout for a green and white 1957 Mercury hardtop automobile, with California license plates number MNJ-592, which would contain one or two colored women. At about 9:15 p.m. that same day, Inspector Dale stopped such a vehicle at the Customs House at San Ysidro, California, as it entered the United States from Mexico (II R. 35-37, 41-42). A man was driving; petitioner was seated next to him in the front seat. When the petitioner and the driver indicated that they did not have any merchandise to declare, Inspector Dale entered the car and drove it over to a customs area where it was subsequently searched (II R. 37-40).

A customs inspectress brought the petitioner into a private search room and told the petitioner that she would have to remove her clothing in order that a "personal search" could be made (II R. 41). The inspectress said that, if the petitioner did not remove her clothing, "measures" would be taken to have it removed (II R. 46). Petitioner then removed all of her clothing. The inspectress found a package of heroin inside of the petitioner's brassiere (II R. 45,

49-50).[2] The inspectress also made a search of petitioner's person. After the petitioner was dressed, she was questioned by customs officers regarding the package of narcotics. She said that she had purchased the "narcotics" in Tiajuana with money supplied to her from a man in Los Angeles named "Bo" to whom she was supposed to deliver the "narcotics", and that she was to receive $100 for her services (II R. 81-82, 90-91, 92). These admissions were denied by the petitioner at the trial (II R. 118, 125-126, 134).

ARGUMENT

1. Petitioner contends (Pet. 8-9, 11-20) that the search and seizure were unlawful because the customs officers lacked probable cause to believe that the petitioner was carrying contraband. The short answer, however, is that 19 U.S.C. 482, *supra*, p. 2, authorizes customs officials to search any person entering the United States "on * * * whom * * * they *shall suspect* there is merchandise which * * * shall have been introduced into the United States in any manner contrary to law" (emphasis added). This statute has been construed to authorize customs searches "of the broadest possible character" at the borders of the United States. *Landau* v. *United States Attorney for Southern District of New York*, 82 F. 2d 285, 286 (C.A. 2), certiorari denied, 298 U.S. 665; *United States* v. *Yee Ngee How*, 105 F. Supp. 517, 520 (N.D. Cal.); see *Carroll* v. *United States*, 267 U.S. 132, 154.

[2] At the trial, the customs inspectress testified that the petitioner was not "anxious" to remove her clothing, but that, once she had done so, she was "cooperative" (II R. 78).

Cervantes v. *United States*, 263 F. 2d 800, 803, fn. 5 (C.A. 9); *Blackford* v. *United States*, 247 F. 2d 745, 749-753 (C.A. 9), certiorari denied, 356 U.S. 914.

In the present case, the Customs Agency Service had received information that the petitioner's car would be used in introducing narcotics into the United States from Mexico, and that two colored women would probably be the occupants of the car. This information, together with a detailed description of the car, including its license tag numbers, was transmitted in the form of a "lookout bulletin" to the Customs House at San Ysidro, California, with instructions to stop (and search) such a vehicle (R. 36-37, 54-55). With this information, the customs officials, at the very least, had "suspicion" that some type of merchandise either subject to duty or illegal, such as narcotics, would be introduced into the United States by the occupants of the petitioner's car. The halting of the vehicle and the search of the petitioner were authorized, therefore, under 19 U.S.C. 482.

2. Petitioner attacks the validity of the presumption arising from "possession" under 21 U.S.C. 174, *supra*, p. 3, on the ground that it eliminates the presumption of innocence and necessity of proof beyond a reasonable doubt. The fact of possession is, however, an issue to be proved beyond a reasonable doubt subject to the presumption of innocence. See *Harris* v. *United States*, 359 U.S. 19, 23; *United States* v. *Valdes*, 229 F. 2d 145, 147 (C.A. 2), certiorari denied, 350 U.S. 996. The fact that the jury is authorized to convict a defendant unless he explains his possession of the narcotics to the satisfaction of the jury is not

unreasonable, for it is "consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." *Casey* v. *United States*, 276 U.S. 413, 418; see *Yee Hem* v. *United States*, 268 U.S. 178, 183-185.[3]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1961.

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[3] The constitutionality of the provisions of 21 U.S.C. 174 here under attack has been sustained against other forms of challenge. See, *e.g.*, *Bradford* v. *United States*, 271 F. 2d 58, 60-63 (C.A. 9); *Dear Chuck Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.); *United States* v. *Mac Lisa*, 105 F. 2d 141, 146 (C.A. 2); *Coppedge* v. *United States*, 37 F. 2d 816, 818-819 (C.A. 6); *Sicla* v. *United States*, 166 F. 2d 851, 855 (C.A. 9); certiorari denied, 334 U.S. 811.